

No. 201,639-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE MATTER OF THE  
DISCIPLINARY PROCEEDINGS AGAINST

CARLLENE M. PLACIDE

An Attorney at Law

Bar Number 28824

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OPENING BRIEF OF APPELLANT PLACIDE

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Attorney for Carlene M. Placide

Kurt M. Bulmer, WSBA # 5559  
Attorney at Law  
740 Belmont Pl. E., # 3  
Seattle, WA 98102  
(206) 325-9949

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## **SUMMARY OF ARGUMENT**

In this case the court is invited to start down the slippery slope of allowing the attorney disciplinary system to be used as a tool in arguments by owners of law firms as to their contractual obligations to each other. This is contrary to long standing case precedence. In this brief Placide argues that the precedence should stand and she should not be sanctioned for her argument with her fellow owners over duties she is alleged to have had to the firms involved.

Placide further argues that the necessary fiduciary obligations to find misconduct were not proved, that a settlement agreement Placide had with the Dorsey firm addressed all fee issues with the firm including the P.S. fees, that finding regarding Counts 1 and 6 are improper since they are not based on the charges, that Placide did not commit ethical violations for lack of candor when she had meetings with the firms; that an aggravator based on questions she asked at the hearing is improperly applied, that the Motion In Limine granted to the Bar was in error resulting in Placide improperly being denied her right to show her state of mind and that the presumptive sanctions analysis for the most serious charges is in error since the hearing officer found knowing states of mind but the Standard applied requires intentional.

### **ASSIGNMENTS OF ERROR**

1. The Disciplinary Board erred when it failed to follow long standing precedence providing that the attorney disciplinary system is not the place to resolve law firm owner's contract disputes.
2. The Disciplinary Board erred when it found that there were Dorsey and Ogletree contracts that created fiduciary duties for Placide
3. The Disciplinary Board erred when it failed to determine that the Settlement Agreement with Dorsey resolve all client fee issues including P.S. fee.
4. The Disciplinary Board erred when it found that Placide's failure to send the P.S. fee to Dorsey was criminal misconduct.
5. The Disciplinary Board erred when it found that Placide charged an excessive fee when she did not send the P.S. fees to Dorsey.
6. The Disciplinary Board erred when it found violations of Counts 1 and 6 beyond those charged in the Amended Formal Complaint.
7. The Disciplinary Board erred when it concluded that Placide had fiduciary duties of candor based on contracts that were violated when she had meetings with the two firms.
8. The Disciplinary Board erred when it recommended disbarment for Counts 2 and 7 where that recommendation was disproportional.
9. The Disciplinary Board erred when it applied an aggravator based on questions Placide asked at her hearing.
10. The Disciplinary Board erred when it refused to reverse a Motion In Limine granted to the Bar which then improperly restricted Placide's ability to show her state of mind.

11. The Disciplinary Board erred when it used an intentional state of mind Presumptive Sanctions Standard when only knowing had been found.

**ISSUES PERTAINING TO  
ASSIGNMENTS OF ERROR**

1. Regarding Assignment of Error 1: Does the *Rice* case control this case?
2. Regarding Assignment of Error 2: Does a policy manual in the case of Dorsey and unwritten “expectations in the case of Ogletree create fiduciary duties to the firms which were breached when Placide made inaccurate statements in meeting with the firms?
3. Regarding Assignment of Error 3: The Settlement Agreement with Dorsey resolve all client fee issues. Can the Board thereafter assert the P.S. was not covered by the agreement?
4. Regarding Assignment of Error 4: The specific criminal section at issue does not cover the circumstances on the P.S, fee and in addition Placide was entitled to the defenses provided in the RCWs regarding good faith retention of funds.
5. Regarding Assignment of Error 5: P.S. got full service for his fees between Dorsey and Placide. He was therefore not charged and excessive fee. The funds retained by Placide were hers as part of the Settlement Agreement.
6. Regarding Assignment of Error 6: Lawyers cannot be found to in violation of uncharged matters after the hearing officer made finding and conclusions on various matters, the remaining charges against Placide in regards to Counts 1 and 6 did not give her notice of the misconduct found by the hearing officer.
7. Regarding Assignment of Error 7: The policy manuals and the unwritten expectations of the law firm’s did not create a fiduciary duty which required Placide to be 100% accurate when she had her meetings with the firms.

8. Regarding Assignment of Error 8: The recommendation of disbarment for Counts 2 and 7 relating to lack of candor is excessively disproportional compared to the *Christopher* case.
9. Regarding Assignment of Error 9: It is improper to punish a with a finding of a deceptive practices aggravator based on a pro se Respondent attorney for asking questions during the hearing.
10. Regarding Assignment of Error 10: The Bar successfully brought a Motion In Limine stopping Placide from discussing her conversation with the "Ethics Hotline." This prevented her from being able to put on her full defense in regards to state of mind.
11. Regarding Assignment of Error 11 : The hearing officer found knowing state of mind but the Board used a Standard that requires intentional in order to find disbarment.

### **STATEMENT OF CASE**

#### **Summary of Events**

Placide was a partner at the Dorsey law firm. While there she also handled outside clients who did not become clients of the firm. She kept the fees earned from these clients. The firm discovered the clients and fees and alleged that under firm policies Placide was not allowed to have outside clients and that it was entitled to the fees Placide had earned from these clients. There was surprise confrontational meeting at which the firm confronted Placide with its allegations. The ODC alleges that her spontaneous responses to Dorsey's allegations in that meeting were dishonest. Placide admits that under the pressure of the moment some of

her statements were inaccurate but denies there was any intent to deceive. Placide and Dorsey entered into a Separation Agreement which identified \$56,700 in fees from outside clients which Placide is to pay Dorsey at some future time.

Placide left Dorsey and became a shareholder at the Ogletree law firm. While working there she continued to take outside clients and keep the fees. Ogletree learned of it and said that it had an “expectation” that there would be no outside clients or fees earned and released her after a contentious meeting. ODC alleges and Placide denies that Placide made dishonest representations at the contentious meeting with Ogletree.

Details and citation to specific event and findings are found in the discussion part of this brief.

Placide contests the following paragraphs of the Findings of Fact found in the AFFCLR: 6, 7, 8, 27, 28, 29, 30, 33, 34, 39, 41, 54, 55, 58, 63, 64, 65, 72, 78, 81, 82, 86, 87, 88, 89, 90, 91, 96, and 97.

Placide contests the following paragraphs of the Conclusions of Law found in the AFFCLR: 1, 2, 3 (in regards to the assertion that there was a fiduciary obligation at all), 10 (in regards to the assertion that Placide breached her contractual and fiduciary duties to the law firms but not as to the conclusion that Placide did not commit theft), 11, 14, 16, 17

(in regard to there being one exception to the conclusion that Placide did not commit theft), 18, 19, 21, 22, 23, 24, 25, 26, 27, 30, 31, and 32.

Placide contests the following paragraphs of the Presumptive Sanctions found in the AFFCLR's: 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 18, 19, 20, 22, 23, 24, 25, 26, and 27.

Placide contests the following paragraphs of the Aggravating and Mitigating Factors found in the AFFCLR's: 1 except substantial experience in the practice of a law.

Placide contests the following paragraphs of the Recommended Sanction found in the AFFCLR's: Placide contests all recommendations suspension and disbarment sanctions including the ultimate sanction of disbarment found the Recommended Sanction portion of the AFFCLR's.

#### **Counts of First Amended Formal Complaint**

The First Amended Formal Complaint in this matter charged Placide with eight counts of misconduct:

Count 1 – By unlawfully appropriating funds belonging to Dorsey, Respondent violated RPC 8.4(b) by committing crimes of theft (RCW 9A.56.040 and/or RCW 9A.56.050 and/or RCW 9A.56.060), and/or violated RPC 8.4(c) and/or violated RPC 8.4(i).

Count 2 - By misrepresenting the extent of her “off-the-books” practice to Dorsey personnel, Respondent violated RPC 8.4(c).

Count 3 – By failing to deposit advance flat fees in trust, as is required in the absence of a flat fee agreement that conforms with RPC 1.5(f)(2), Respondent violated RPC 1.15A(c)(2).

Count 4 – By failing to return unearned portions of P.S.'s fee on termination of representation and/or by failing to promptly return unearned portions of Client A's Fees, Respondent violated RPC 1.15(A)(f) and/or RPC 1.16(d).

Count 5 – By keeping \$2,500 in legal fees paid to her by P.S. without performing the work she agreed to perform on his behalf, Respondent charged an unreasonable fee in violation of RPC 1.5(a).

Count 6 – By unlawfully appropriating funds belonging to Ogletree, Respondent violated RPC 8.4(b) by committing crimes of theft (RCW 9A.56.040 and/or RCW 9A.56.050 and/or RCW 9A.56.060), and/or violated RPC 8.4(c) and/or violated RPC 8.4(i).

Count 7 – By representing to Ogletree that she did not represent outside clients while employed at Ogletree and/or the number of outside clients she represented while at Ogletree, Respondent violated RPC 8.4(c).

Count 8 – By failing to deposit advance flat fees in trust, as is required in the absence of a flat fee agreement that conforms with RPC 1.5(f)(2), Respondent violated RPC 1.15A(c)(2).

### **Conclusions of Law and Recommendations**

Counts 1 and 6 – Criminal Conduct – Keeping Fees: In his AFFCLR's the hearing officer determined that in regards to the criminal allegations of Counts 1 and 6 – keeping the fees - Respondent had violated RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty and trustworthiness) in one instance because she had violated RCW 9A.56.020(1)(a) and(c) (the crime of theft) when she did not pay over to Dorsey \$2,050 in fees paid to her by client P.S. The hearing officer dismissed all other allegations of criminal misconduct and all allegations of violations of RPC 8.4(i) (committing acts of moral turpitude or corruption).

He found she acted knowingly, that the conduct was not serious criminal conduct, that Standard 5.12 applied and that the presumptive sanction for not paying over the \$2,050 was suspension.

Count 1 and 6 – Dishonesty - Keeping Fees : The hearing officer found that while Counts 1 and 2 – keeping fees – was not criminal conduct (except for the \$2,050) Placide had violated RPC 8.4(c) (dishonesty, deceit and misrepresentation) by “engag[ing] in an ongoing pattern of misrepresentations, dishonesty and deceit by performing legal services for outside clients while she was a Dorsey partner, retaining the fees for those services, and concealing her receipt of those fees from Dorsey” and by

“engag[ing] in misrepresentations, dishonesty and deceit by performing legal services for outside clients while she was an Ogletree shareholder, retaining the fees for those services, and concealing her receipt of those fees from Ogletree.”

He found she acted knowingly as to the RPC 8.4(c) provisions of Counts 1 and 6, that there was actual and potential harm, that Standard 5.11(b) (intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice law) applied, and that the presumptive sanction was disbarment.

Count 2 and 7 – Misrepresentation – Dealings with Firms: In regards to Counts 2 and 7 – dealings with the two firms - he found a violation of RPC 8.4(c) (dishonest, deceit and misrepresentation) by “misrepresenting the extent of her legal service for outside clients and the amount of fees she received while a Dorsey partner” and by “misrepresenting to Ogletree representatives that she did not represent clients while employed at Ogletree, and the number of such outside clients.”

He found Placide acted knowingly, caused actual and potential harm, that Standard 5.11(b) (intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the

lawyer's fitness to practice law) applied, and that the presumptive sanction was disbarment.

Counts 3 and 8 – Trust Account Violations: Regarding Count 3 and 8 he found violations of RPC 1.15A(c)(2) (must deposit advance fees to trust account absent RPC 1.5(f) agreement) when she did not deposit flat fee funds to a trust account when her fee agreements did not have the necessary RPC 1.5(f) language.

He found that her conduct was negligent, that there was actual harm to one client when the client did not get her money quickly and potential harm to others, that Standard 4.13 applied and that a reprimand was the presumptive sanction.

Count 4 – Failure to Give \$2,050 to Dorsey: Regarding Count 4 he determined there had been a violation of RPC 1.15A(f) (delivery of property of another) when she did not send \$2,050 to Dorsey. He determined that this conduct was knowing and caused actual injury, that Standard 4.12 applied and that the presumptive sanction was suspension.

Count 5 – Charging Unreasonable Fee: Regarding Count 5 he determined there had been a violation of RPC 1.5(a) (charging unreasonable fee) when Placide did not perform work for a client and retained his \$2,500 (this is the same client as in Count 4). He determined

that the conduct was knowing, that there was not serious injury, that Standard 7.2 applied and that the presumptive sanction was suspension.

He determined the aggravating factors to be pattern of misconduct, multiple offenses, false statements or other deceptive practices during the disciplinary process, refusal to acknowledge wrongful nature of misconduct, substantial experience in the law and indifference to restitution.

He determined the mitigating factors to be absence of disciplinary record and in regards to Count 5 timely good faith effort to make restitution.

The hearing officer did not engage in any balancing of the aggravators and mitigators. He determined that the misrepresentation charges at Counts 1, 2, 6 and 7, while not crimes did seriously adversely reflect on Placide's fitness to practice law and recommended disbarment.

Placide does not intend to contest the finding of negligence and the recommendation of a reprimand in connection with Counts 3 and 8 dealing with her not depositing flat fee funds to a trust account when her fee agreements did not have the necessary RPC 1.5(f) language.

## **DISCUSSION**

### **Counts 1 and 6 - Keeping Outside Client Fees**

Precedence Controls Counts 1 and 6: Counts 1 and 6 deal with the allegations the Placide improperly retained fees which should have gone to the firms. This is a civil contractual matter between owners of law firms. Because the hearing officer found there was no criminal misconduct, except for the \$2,050 relating to P.S. discussed below, the law of the case in this matter is that this is not a matter of theft but rather that of interpretation and application of contracts between owners of law firms. The hearing officer makes clear that his entire reason for finding misconduct is his belief that there were contracts between the owners of these law firms that created fiduciary duties between them which in turn required Placide to turn over fee she earned from her outside cases. These are intrapartnership or intrashareholder accounting disputes which this court has advised is not within the purview of the attorney disciplinary proceedings. *Matter of Rice*, 99 Wn.2d 275, 661 P.2d 591 (1983).

Rice and his partners got into a dispute as to Rice's use of fees the other partners claimed belonged to the firm. When the case came before this court it stated: "This court under no circumstances should involve itself in intrapartnership accounting disputes." *Rice* at 279.

*Rice* is the long standing precedent on the issue of partnership contractual disputes over money. The Placide case is not about having outside clients but rather according to the hearing officer rather the contractual problem if keeping the fees from such clients. *Rice* tells us that Bar disciplinary proceedings are not to be used as a tool for partners/shareholders disputes particularly when it comes to money.

The Bar likes to point to *In the Matter of the Disciplinary Proceedings Against James P. Sheldon*, 107 Wn.2d 246, 728 P.2d 1036 (1986) to seek to counter *Rice* but the court said in *Sheldon* at 255 “*Rice* is not applicable where, as, here an associate helps himself to law firm funds....” [Underlining added.] *Sheldon* deals with what happens with an associate steals firm funds and is not based on contractual issues between a firm and its partners. There is some additional discussion of *Rice* in *Sheldon*, at 254-255, but it is dicta. There is a fundamental difference between partners and shareholders fighting over what is meant by their organizational agreements (or as in this case regarding Ogletree, the unwritten “expectations” of the partners/shareholders) and associates taking firm clients and firm fees. *Sheldon* does nothing to diminish the *Rice* precedent.

There is nothing inherently improper about a partner/shareholder having outside clients and keeping the fees. There is no RPC prohibiting

such practices. The alleged RPC violations rely first and foremost on a determination that there were contractual obligations and that such obligations were breached. It is a very slippery slope for the court to open the disciplinary system for the use of owners of law firms to seek to sort out their money issues. Once that door is opened it is impossible to determine where the bottom of that slope will be. The disciplinary system will be asked, as the hearing officer did in this case, to interpret the contracts and the expectations of the owners of law firms.

Absent a policy to stay out of law firm owners' fights, there is nothing which prevents almost any clause in any contract or expectation from being subject to disciplinary proceedings. For example, a senior partner knowingly takes two months paid vacation when only entitled to one month under the partnership agreement. Lawyer says "I felt entitled to the extra month since I put in a huge amount of overtime on that big case we won and which brought in huge bonuses. I could not image you complaining." Law firm, using the theory of the present case says, "Resolve this favorably to us or we are going to the Bar Association since you got something of monetary value which under our interpretation of the contract you were not entitled to get."

The hearing officer in this matter lost sight of what these proceedings are about. They are licensing proceedings conducted by a

government body to see if clients, other parties, the public and the court system need protection from the charged attorney. Bar proceedings are not the place for unhappy partners and shareholders to fight about their contractual differences which was the point of *Rice, supra* and there is no reason to change that public policy now.

The Hearing Officer and the Board have not discussed *Rice*. It is not as though they have put forth a rationale to distinguish *Rice* from Placide's case. They have not. They have simply ignored this court's precedent.

This court should not lightly overturn precedence based on sound public policy which has stood for over 30 years. There is no reason to do so in this case. On that basis Counts 1 and 6 should be dismissed.

If Rice is Overturned the New Interpretation Should be Applied Only Prospectively: If the court determines to overturn *Rice*, application of this new standard should only apply prospectively. *In re Disciplinary Proceeding against Haley*, 156 Wn.2d 324, 339, 126 P.3d 1262 (2006), where there was an absence of a prior decision of the court as well as conflicting or equivocal authority from other jurisdictions the rule under consideration was impermissibly vague and, therefore, while applying the court's interpretation to future cases, it dismissed the count related to the newly interpreted rule. In Placide's case, there is a prior decision of the

court which should be controlling but if not then in overturning the prior decision, the new interpretation should be applied prospectively and Count 1 and 6 dismissed similarly to the dismissal in *Haley*.

The hearing officer determined that because of a written partnership policy in Dorsey and because of unwritten expectation at Ogletree, Placide had fiduciary obligations to the firms. From this he finds that the attorney licensing portion of the state government should become embroiled in cases which do not involve theft and do not involve fiduciary duties to clients or courts.

Count 1 Must be Dismissed Since Dorsey Policies Do Not Create Necessary Fiduciary Obligation: Dorsey claimed it had policies which did not allow outside clients and that required all legal fees earned to be delivered to the firm. The hearing officer's position is that these policies therefore created a fiduciary relationship which required Placide to turnover fees earned from outside clients.

The hearing officer does not explain why the mere existence of firm policies create a fiduciary relationship. There was no proof that Placide ever saw the policies until after the confrontational meeting. The hearing officer seems to impute a duty to her simply because of policies buried in an office manual. There is not proof that she had actual knowledge so she has not have knowingly violated of any fiduciary duties.

As the hearing officer makes clear, absent a fiduciary duty Placide did not violate any rules. The knowing breach of the fiduciary duty to deliver fees for outside clients has as its key component actual knowledge of the duty intentionally. Placide did not engage in any intentional breach of fiduciary duty since she did not know or believe that there was any such duty in regards to outside clients and fees. Count 1 must be dismissed since the premise that she knew alleged fiduciary duty is false.

Count 6 Must be Dismissed Since Ogletree Expectations Cannot Serve as Basis for Sanction: The hearing officer specifically found the there was no written agreement at Ogletree but rather that the alleged fiduciary duties owed by Placide were based on the “expectations” of Ogletree. AFFCLR 62 and 63. The fact that the hearing officer had to rely on expectations rather than an actual contract shows just how slippery the slope is if the court allows the disciplinary system to become embroiled in law firm owners’ employment disputes. In a series of findings based on the premise that “because of this Placide must known about that” the hearing asserted that Placide knew of the supposed Ogletree expectations. The conclusions that “because of this it must mean that” are incorrect and are based on the assumption that there is only one conclusion that can be reached from the premise and s a contract

The hearing officer says that Placide knew of this expectation because she had been an attorney with other large law firms. This implies that all large law firms have the same policies but there was no evidence to support this contention. Just because she was in other law firms does not mean she was aware of Ogletree's unwritten expectations.

The hearing officer finds that Placide knew of Ogletree's expectation since he can take judicial notice that it is the custom for law firms to require their partners to perform services exclusively for firm clients. The hearing officer cannot just randomly put his thoughts on the record and call them "judicial notice." Judicial notice can only be made under ER 201, which was not complied with here. The hearing officer improperly based a determination on his personal opinion without a basis in the record. *In the Matter of the Disciplinary Proceeding against Jerry Kagele, Attorney at Law*, 149 Wn.2d 793, 813, 72 P.3d 1067 (2003).

The hearing officer finds that Placide knew of the expectations at Ogletree since she had been terminated at Dorsey for representing outside clients. That does not show that she knew what Ogletree's expectations were. It does not follow like the night the day that because Dorsey had a policy, Ogletree must have had the same policy.

The hearing officer finds that Placide knew of the expectations at Ogletree because Placide did not ask Ogletree what its policy was

regarding taking outside clients. It appears the implication is that she did not ask since she knew the answer would be that they are not allowed to take outside clients but it is just as logical to say that having come from a large law firm with written procedures that the absence of such writings shows that the firm had no such policy.

The hearing officer finds that Placide knew of the expectations at Ogletree because Placide made statements before and after being confronted by Ogletree that demonstrates she knew that representing outside clients was not permitted. Such statements are not identified so we do not know which statements the hearing officer is referencing so this assertion is not subject to meaningful review and therefore cannot be sustained.

The hearing officer finds that Placide knew of the expectations at Ogletree because Placide denied the outside representation and getting the fees. It appears the implication is that if she thought it was okay why would she deny the representation and fees? A reasonable alternate interpretation is that she did not think it was any of their business to be asking after clients when the basis was an unwritten policy which she never agreed to and was never told about.

None of the reasons cited by the hearing officer support the finding that Placide knew about Ogletree's unwritten and uncommunicated policy.

There is no proof that Placide was ever told about the alleged expectation and she is supposed to have picked it up by osmosis including being aware of the “custom” in law firms the only evidence of which is the hearing officer’s unsubstantiated personal opinion.

The hearing officer seems to feel that there is only one kind of law firm owners’ agreement and, therefore, all firms must have agreements that require outside client fees to be paid to the firm. By this approach, the hearing officer has shifted the burden of proof to Placide to prove what the law firm’s agreement was. That is not how it works. The Bar had to prove that in the specific instance of the contract with Ogletree there was a binding contract that required Placide to turn over fees from outside counsel. The record must support such a finding but as explained above, it does not. Since Count 6 is premised on the basis of the unproven existence of a contract with between Placide and Ogletree and there being no proof of that contract. Count 6 must be dismissed.

Conclusions Regarding Counts 1 and 6: Because

- The *Rice* precedence controls this case, and
- Dorsey policies do not create necessary fiduciary obligation; and
- Ogletree expectations cannot serve as basis for sanction

Counts 1 and 6 and must be dismissed.

### **Counts 1, 4 and 5- The P. S, Funds**

Although the ODC made sweeping charges of theft in Counts 1 and 6, the only theft charge the hearing officer found related to one client's funds, client P.S. The hearing officer found this was a Count 1 violation. These same funds are also at issue in Count 4 for Placide not sending the funds to Dorsey when P.S. told her that if she wanted to transfer any funds to send them to the firm and Count 5 for charging an unreasonable fee when she retained P.S.'s funds but did not finish the work.

Dorsey Settlement Agreement - Rice Controls: At the heart of these findings against Placide is the hearing officer's interpretation of the Separation Agreement between Dorsey and Placide. Ex. A-129. Finding of misconduct based on interpretations of the settlement agreement is another example of the misuse of the disciplinary system to enforce contracts between law firm owners. The hearing officer's creation of the concept that Placide "stole" funds from Dorsey is set up entirely from his interpretation of the settlement agreement but that agreement is part and parcel of an "intrapartnership accounting [dispute]." *Rice* controls this situation. The disciplinary system is not the place to sort out such issues between owners. Counts `1 as it related to the P.S. fees, as well as Counts

4 and 5 must be dismissed because they were improperly considered under *Rice*.

Dorsey Settlement Agreement Resolves P.S. Fees: The hearing officer seems to feel the settlement agreement was intended to only cover known claims against Placide by the firm so that if there was anything different which she might know about she was being dishonest but that is not what the agreement is about. The agreement was intended to “resolve actual and potential claims including all claims relating to any aspect of Placide’s association with Dorsey and its termination.” Ex. A-129, Preamble, page 1. It was a mutual release of all claims in which Dorsey released and discharged Placide “from liability for all claims Dorsey may have ... including without limitation, claims arising under any statutory or common law theories of recovery, whether developed or undeveloped....” Ex A-129, clause 3.a. In short, this was a release of any and all claims whether known or unknown by Dorsey against Placide.

The agreement contained a provision for Placide to pay Dorsey for fees collected from some of her outside clients. The hearing officer seems to take the position that Placide made a representation that the list of clients and amounts was complete and exhaustive. She made no such affirmative representation in the agreement. It does not contain any clause in which she says that she is vouching that the numbers the firm came up

with were all the revenue she had earned. The relevant clause does not say she is.

7. Revenues From Clients. Placide represents that from the time she joined Dorsey through the Separation Date, she individually received and retained a total of fifty-six thousand seven hundred dollars (\$56,700) for legal work, through checks, cash or wire transfers. A detailed listing of clients and payments is attached hereto as Exhibit A.

Ex. A-129, clause 7. All this clause says is that she agrees she got that much. It does not say that this is all she got and the firm did not ask her to. The client list and amounts came from the firm and it knew full well that it likely did not have all the revenues but was willing to agree to the Separation Agreement for the \$56,700.

Q: (ODC) Is it possible there were actually more off-the-books clients that you didn't find?

A: (Jorgenson from Dorsey) Yes.

Q: Why do you think that?

A: As I said, we only had 90 days worth of email. There were some other emails that looked to be -- didn't have any financial references in them to money changing hands from other people who were not in our system; but they appeared to be kind of wrap-up or conclusion or follow up things, and so we didn't include those as part of the investigation and didn't try and pursue it any further. At some point we got to the point where we had this \$56,000 worth of client funds that we could or money that changed hands that we could document, and we thought that was enough. We didn't really -- The law of diminishing returns then kind of came into play, and we really didn't have enough -- didn't see any real effort in trying to kind of look for more.

RP page 94. The firm simply stopped looking for more funds.

P.S. retained Placide to perform immigration work before she left Dorsey. He paid her \$2,500 consisting of one \$450 payment and one \$2,050 payment. At the time the Separation Agreement was entered Dorsey was aware of the \$450 payment and it was reflected as part of that agreement. Exhibit A-129, page 8. After Placide left Dorsey P.S.'s work was completed by Dorsey attorneys. Placide learned the work had been completed by Dorsey and asked P.S. if he wanted the funds returned to him. He told her not to send a refund to him.

As P.S. reported to Dorsey in an email, he told her that "[S]he should get in touch with [Dorsey] if she wants to transfer any funds, as [Dorsey are] the ones who did the job." Ex A-119A. Placide did not send the funds because she believed the funds were covered by the Separation Agreement. At some point "months" after the settlement agreement the firm learned of the \$2,050 payment when it asked P.S. for the cancelled check reflecting that payment. RP 212-213. It made no demand for the funds. Apparently the firm did not feel it was entitled to funds yet the hearing officer in the face of the party with the interest did, finds the firm was entitle to the funds based on the Settlement Agreement. If the firm had felt it was entitled to funds above and beyond the amounts agreed to in the Separation Agreement they could have asked for them but there is no

evidence they ever did. We do not know why they did not demand the money but one reasonable inference, given the release from any and all claims known or unknown, is that the firm too felt that it had no claim to the funds.

Counts 1 as it relates to the P.S. fees as well as Counts 4 and 5 must be dismissed since they are covered by the Settlement Agreement and, as the Dorsey's own actions show, were not owed to Dorsey.

No Criminal Misconduct – Count 1: In Count 1, the hearing officer found that in relation to not giving P.S.'s funds to Dorsey, Placide had committed criminal misconduct pursuant to RCW 9A.56.020(1)(a) and (c):

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

....

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable....;

He specifically limited his finding to the failure to pay Dorsey asserting that the funds were owed to Dorsey. However, regarding section

(1)(a), Placide did not wrongfully obtain or exert unauthorized control over the property of Dorsey with the intent to deprive it of its property. Dorsey had no claim to the property – it had released any and all claims whether developed or undeveloped to any funds related to Placide's outside clients. *See* above.

The hearing officer's argument that Dorsey did not know about the additional fees at the time of the Separation Agreement is irrelevant, When it entered into the Separation Agreement Dorsey was aware that there could be additional funds but had not pursue them but rather gave up any claim to them in order resolve its issues with Placide.

P.S. told Placide that he did not own the funds since he had received the services he asked for. He would have no way of knowing what kind of severance agreement Placide and Dorsey had or want kind of allocation of accounts receivable may have occurred. He relinquished control and left it to the parties to resolve the allocation of funds but made sure that Dorsey knew about a potential fee. Knowing of the fee, Dorsey did nothing. Placide believed that once P.S. gave up any claim of ownership it then became a matter of looking to the Separation Agreement which provided that she did not owe Dorsey anything more than what was specifically provided for in the agreement.

Placide did not appropriate lost or misdelivered property under section (1)(c). P.S. did not abandon the property and did not misdeliver them to Placide. He did relinquish any claim to the funds. He knew who he sent them to and left it to the parties to sort out what went were.

Neither of the sections of RCW 9A.56.020 apply in this set of facts.

Furthermore, Placide is entitled to the defense provided by RCW 9A.56.020(2)(a) since she claimed the funds with the full knowledge of them by firm. She claimed them under the good faith belief that the firm did not have a claim on the funds. The ODC failed to prove that Placide had engaged in theft and/or that she did not have the defense provided in the statute.

Count 1 as it relates to the P.S. fees must be dismissed since Placide did not misappropriate the funds under either of the provision of RCW 9A.56.020 and since she is entitle to the defense provided by RCW 9A.56.020(2)(a).

Count 4 – Not Sending P.S. Fees to Dorsey: Count 4 asserts a violation for Placide not sending the P.S. funds to Dorsey. The hearing officer's position is that once P.S. declined to accept a refund the fees became the property of another (Dorsey) and Placide had an obligation to send the funds to Dorsey. But as discussed above the funds were not

Dorsey's. They had given up any claim to them once it signed the Separation Agreement. Count 4 cannot stand since the premise that the funds belonged to a third party (Dorsey) is not accurate.

Count 5 – Excessive P.S. Fee: The finding of violation at Count 5 is based on the premise that Placide charged an excessive fee since she kept the entire \$2,500 P.S. fee even though she did not do \$2,500 worth of work. P.S. felt he got value for his work so did not want a refund which Placide offered to send him. At that point it became an issue of the fight between Placide and the firm over the accounting and who owned what funds but P.S. was not charged an excessive fee. The hearing officer's position is convoluted but it seems to be that since Placide did not personally provide the services but personally kept the funds, she charged an excessive fee since she did not send the fees to Dorsey. This seems to be a sort of argument that she was not entitled to the fees so she got a windfall. But it was not a windfall, since, as discussed above, Dorsey had no claims to the funds having given up any and all claims related to the funds she had received while at Dorsey. The ODC failed to prove that an excessive fee was charged and Count 5 should be dismissed.

### **Improper Findings at Counts 1 and 6**

The hearing officer has entered improper conclusions of law on the retention of fee portions of Count 1 and 6. The two counts are mirror images except for the names of the firms and provide:

By unlawfully appropriating funds belonging to Dorsey [Ogletree], Respondent violated RPC 8.4(b) by committing crimes of theft (RCW 9A.56.040 and/or RCW 9A.56.050 and/or RCW 9A.56.060) and/or violated RPC 8.4(c) and/or RPC 8.4(i).

He did not find criminal conduct except for the P.S. matter discussed elsewhere and he dismissed the RPC 8.4(i) charges so what remains is this:

By unlawfully appropriating funds belonging to Dorsey [Ogletree], Respondent ... violated RPC 8.4(c)....

Yet the hearing office seeks to convert Count 1 and 6 into a much broader condemnation of Placide stating that Placide engaged in an ongoing pattern of misrepresentations, dishonesty and deceit by performing legal services for outside clients while she was a partner/shareholder at the firms, retaining the fees for those service, and concealing her receipt of those fees from the firms. AFFCLR 21 – 23.

Placide is entitled to due process and at a bare minimum specific notice of the charges against her. *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 136-37, 94 P.3d 939 (2004). (An attorney has a due process right to be notified of clear and specific charges and to be afforded an opportunity to anticipate, prepare, and present a defense.

[Underling added.]) Counts 1 and 6 give her no notice much less clear and specific charges regarding ongoing dishonesty by performing legal services for outside clients and concealing those receipts from the firm. These may or may not have been chargeable but they were not charged in Counts 1 and 6 which after various dismissal by the hearing officer consisted of "[b]y unlawfully appropriating funds belonging to Dorsey [Ogletree], Respondent ... violated RPC 8.4(c)...." As such the only charge she was on notice about is the allegation that she unlawfully appropriated funds when she did not delivery the funds to the firm. The hearing officer specifically found that except for the P.S. matter, Placide did not violate any laws. He carefully articulates that while he believes there were contractual obligations to deliver the funds there was no law that required her to do so.

Bar prosecutors, just like criminal prosecutors, must be held to the words they pick when charging a respondent or defendant since that is all such person has to go on. If the ODC meant something other than unlawful appropriation of fees it had to say so but it did not.

The hearing officer sought to expand what Counts 1 and 6 covered but those counts were limited to unlawful appropriation of fees in violation of RPC 8.4(c) so any findings of violations of Counts 1 and 6 other than the P.S. fees were not charged and cannot serve as the basis of

any rules violation. As a matter of due process, Counts 1 and 6, except for the P.S. fees must be dismissed.

**Counts 2 and 7 - Candor with the Firms**

The hearing officer found violations of the dishonesty/misrepresentation provisions of RPC 8.4(c) based on Placide supposedly not being honest with her firms when confronted by them. These assertions relate largely to one meeting at each firm where Placide was confronted by members of the firm's management and accused of improperly taking outside clients and keeping the fees. Her reactions at those meetings serve as the basis for the findings of dishonesty/misrepresentation.

The hearing officer found a violation of RPC 8.4(c) (dishonest, deceit and misrepresentation) because she "misrepresent[ed] the extent of her legal service for outside clients and the amount of fees she received while a Dorsey partner" and because she "misrepresent[ed]to Ogletree representatives that she did not represent clients while employed at Ogletree, and the number of such outside clients." The hearing officer's premise is that Placide had contractual and "expectation" obligations with the firms and this then created a fiduciary relationship which required a duty of honesty. ("Respondent had contractual and fiduciary duty to turn

over funds...., AFFCLR 11; “Respondent’s law firms owned the contractual right to be paid all the fees.... AFFCLR 13.)

The alleged misrepresentations are therefore:

Dorsey – The extent of her legal service and the amount of fees she received

Ogletree – Stating that she did not represent clients while employed at Ogletree and the number of such outside clients.”

These are the findings and her conduct must be judged on these four items, not other references in the record.

First it is to be noted that Placide denies lying to anyone. She was flustered and pressured in these surprise meetings and while she may have been wrong on some matters she did not seek to mislead anyone. She was not under oath and not in court. She was confronted with a barrage of allegations and she did not have time to get herself organized so in a defensive reaction she denied allegations being thrown at her. She did not have time to form any intent to lie and there is no proof that she had such intent. All the proof shows is that when confronted she reacted and made mistakes. When in a surprise pressure situation, people make mistakes and sometime say the first thing that comes to mind. That is why dishonesty and misrepresentation take intent and are not proven simply because in a surprise pressure situation someone says something which is not accurate.

The duty rests with the ODC to show the actual knowing and intentional act of lying, not just making a mistake. There was no proof of intent so while she was flustered and said somethings which were not accurate the Bar did not show she lied at these meetings.

No Duty for Candor in These Circumstances: We recognize that there is a general idea that we should all be honest all the times but if one does not owe a duty of honesty of some sort then it does not violate an ethical precept if the lawyer says something which is untrue. For example, as a lawyer I am presumptively under the same duty of honesty as any lawyer but what if a blog reporter calls me up and asks if I have ever represented a certain judge. I suppose I could just say “I cannot discuss that one way or the other with you” but I believe that irresponsible reporters take such remarks and spin them to look like the judge must have contacted me otherwise I would just have said no. Accordingly, what if I say no even if the judge did consult with me. It is indeed a lie but is it one for which I should be sanctioned? No ethics sanction is appropriate because I do not owe the reporter any duty to tell the truth.

The same is true here, Placide denies that she lied at all but if she did it is not an ethics violation since there was no contract creating a duty for her to tell Dorsey or Ogletree anything about these matters. Again, for example, suppose the Ogletree shareholders had confronted her without

warning and demanded that she tell them about a sick family member. If she said “I have no sick family member” when she did, is she subject to an ethics violation? No, because she has no duty to tell the firm anything about a sick family member and if she wants to lie about it, she can do so without violating the ethics rules. Here the hearing office concedes there is no contract but only an unwritten expectation. Placide’s statements at the ambush meeting may have been inaccurate but they are not subject to sanction absent a contract creating a duty.

As discussed above Placide had no such contractual or expectation duty and, therefore, no such fiduciary duty. Absent such fiduciary duty she is not to be found in violation of the honesty rules.

Statements Not Material: The statements alleged to have been dishonest were not material. In Dorsey the finding is that she did not state the extent of her legal service and the amount of fees she received but she did say she had done the legal services and had earned outside fees. So it is the scope which is at issue. The material information was she doing outside work and did she get fees which she kept. Absolute precision was not necessary nor significant. Any errors in this regard are material misrepresentations.

In Ogletree the finding is that stated she did not represent clients while employed at Ogletree and the number of such outside clients. She

did tell them what she was doing so her initial response regarding this was quickly corrected. Plus the firm already had the information that she was representing outside clients so any repose from her was not material to what they understood. She made a guess as to the number of outside clients but just as in Dorsey, the material information was that she was representing outside clients, not the number of them.

Findings of misconduct based on the supposed misrepresentation identified by the hearing officer cannot be supported since any such misrepresentation was not material.

Candor with Dorsey: Dorsey claimed it had policies which did not allow outside clients and that required all legal fees earned to be delivered to the firm. The hearing officer's position is that these policies therefore required her to state with 100% accuracy at the confrontational meeting the extent of her legal service; and the amount of fees she received.

The hearing officer does not explain why firm policies create a fiduciary relationship. There was no proof that Placide ever saw the policies until after the confrontational meeting. The hearing officer seems to impute a duty to her simply because of policies buried in an office manual. She did not know of the policy so she may have been negligent when she talked to them at the meeting but she was not intentionally in violation of any fiduciary duties since she did not know of any.

The knowing breach of the fiduciary duty of honesty has as its key component knowing Placide did not engage in any knowing breach of fiduciary duty since she did not know or believe that there was any such duty in regards to disclosing the scope of her outside work or the amount of fees earned.

Candor with Ogletree: In Ogletree the hearing officer specifically found there was no written agreement at Ogletree but rather that the fiduciary duties owed by Placide were based on the “expectations” of Ogletree. AFFCLR 62 and 63. *See* discussion above. Recall that the hearing officer’s premise for the fiduciary duty is that the partners had contractual obligations to each other to not take outside clients which then required a duty of candor when asked about such clients. In the absence of any such contract, there is no duty. There is not proof of such contract so there cannot be a finding of misconduct based on it.

Recommendation of Disbarment for Counts 2 and 7 is Not Proportional: In addition to the discussion below on the ABA Standards, the recommendation of disbarment for Counts 2 and 7 regarding candor with the two firms is not proportional. In *In the Matter of the Disciplinary Proceeding Against Margaret Diamond Christopher, an Attorney at Law*, 153 Wn.2d 669, 105 P.3d 976 (2005). Christopher was found to have been dishonest when she gave very clear testimony under oath in a trial. She

was not found guilty of perjury but was found to have nonetheless not been honest on the stand. She received a 18 month suspension.

Placide's lack of candor, if indeed there was any, was not under oath but rather in private and heated meetings when she was under attack. A recommendation of disbarment is wildly disproportional. At the most her actions call for a reprimand.

### **Aggravators**

The hearing officer found the as an aggravator that Placide made false statements or engaged in other deceptive practices during the disciplinary proceedings. AFFCLR page 30. He based this on his findings at AFFCLR 97 that four times during her pro se examinations of witnesses she asked questions based on premises which he claimed were contradicted by overwhelming evidence. This is incredible. It appears that after hearing all the evidence, he was convinced that the premises in these questions were not supported by the evidence. From this he determines that she was making false statements when she asked her questions.

Just because he did not ultimately find facts consistent with her questions does not mean she made false statements or engaged in deceptive practices. The questions were not under oath or while she was on the stand. The hearing officer does not point to any place where she made the same statements while on the stand.

As stated above, lawyers are entitled to due process which includes “to be afforded an opportunity to anticipate, prepare, and present a defense.” *Romero, supra*. In presenting a defense the lawyer is entitled to present his/her theory of the defense which includes asking witnesses if they recall events a certain way. This is true even where the evidence is pointing in a different direction. A lawyer is entitled to challenge witnesses and to see if they will change their testimony when confronted with a different set of facts. A pro se lawyer may have a memory of events happening one way and ask questions with that premise but then as a strategic matter determine to not pursue that testimony when on the stands him/herself.

The hearing officer’s finding that the mere asking of questions soliciting whether or not the witness remembers an event is the making of a false statement or is a deceptive practice chills the right of a respondent to put the Bar to a vigorous proof. While the hearing officer found that the evidence was overwhelmingly headed a different direction there is no proof that Placide did not remember it as she asked. Perhaps she was mistaken or perhaps she recalled it one way but had her memory refreshed hearing the answer but in any case, there was no proof that when she sought to put on her defense by asking questions premised on one version,

that when a different version is shown to have happened, that a false statement was made.

The aggravator of false statement was not shown and should be struck.

### **Motion In Limine re State of Mind**

At the beginning of the case, the ODC brought a motion in limine seeking to prevent Placide from testifying that she had talked with the ethics line about her situation in 2012. Placide sought to admit such conversation to show her state of mind. RP 18-20. The ODC based its motion on APR 19(e)(5) which is part of the admission and practice rules dealing with lawyer services provided by the Bar. Subsection (e) deals with the “Professional Responsibility Program.” This is a program which allows lawyers to call professional responsibility counsel and seek ethics advice. It is commonly called the ethics hotline.

Subsection (e)(5) provides in relevant part that any information provided during a hotline conversation is not “admissible in any proceeding under the Rules of Enforcement of Lawyer Conduct.” Based on this language the hearing officer granted the motion and prohibited Placide from offering any testimony about her call with the hotline attorney.

A crucial part of the ABA Standards are the lawyer's state of mind. There are dramatic and significant differences depending on what is determined to be the state of mind. As such a lawyer will seek to put on evidence showing that she acted in good faith so that the state of mind is negligence rather than knowing or intentional. Seeking advice from a recognized source of wisdom and following that advice could tend to show good faith. One such source could be the ethics hotline. However, if a lawyer does consult the hotline the very obscure provisions of APR 19(e)(5) seek to prohibit the lawyer from later using such consultation to show good faith.

No rationale for the rule is presented within it nor is one readily apparent. The submission of any such information from the lawyer would be subject to hearsay and credibility determinations just as with any other evidence. However, if the lawyer can credibly testify that she had such conversation then there would not seem to be any reason why a hearing officer could not consider such evidence absent the APR rule.

The rule is overbroad. As discussed above, a lawyer has a constitutional right to put on her defense including state of mind. "The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right ...." *State v. Rupe*, 101 Wash.2d 664, 705, 683 P.2d 571 (1984). APR 19(e)(5) involves a denial of substantive

due process. “Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir.1994) cited favorably in *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006). Licensing matters will generally not involve a fundamental right so the rationale basis test is applied. “Under this test, the challenged law must be rationally related to a legitimate state interest.” *Amunrud, supra* at 222. A rule preventing Placide from offering her best defense is arbitrary and capricious and unconstitutional since there is no rational basis for a blanket rule denying Placide the right to put on her state of mind defense regarding a conversation on the hotline.

All findings, conclusions of law and recommendations which involve state of mind are invalid since Placide was denied her constitutional right to put on her best defense on state of mind, The only meaningful remedy is remand for a new hearing.

#### **Presumptive Sanctions for Counts 1, 2, 6 and 7**

The presumptive sanction analysis for the most serious charges is fatally flawed. AFFCLR pages 25 through 27. These are the counts which find misrepresentation relating to keeping the fees and in dealings with the firm and for which the hearing officer recommends disbarment. The

hearing officer found that Placide acted knowingly as to these four counts, paragraph 6, page 25, AFFCLR, but then did his presumptive sanction analysis based on Standard 5.11(b). That standard requires “intentional conduct.” Paragraphs 9 and 10, page 26-27, AFFCLR. The proper Standard for knowing is Standard 5.12 with a presumptive sanction of suspension. The distinction cannot be based on his determination at paragraph 11, page 27 that Placide’s behavior “seriously adversely reflects on the lawyer’s fitness to practice” since that provision is in both Standards. Nor can this be based on a balancing of the aggravators and mitigators since even though he listed them, he did no balancing. Page 29-31, AFFCLR.

The hearing officer’s recommendation regarding disbarment means little and must be completely disregarded. Presumably the Board could take the factual findings and engage in a de novo review as to which standard applies but that process too is fatally flawed since Placide was denied her right to put on her full defense at the hearing level when she was not allowed to put on important testimony about her state of mind and good faith.

### **Conclusion**

Except for the allegations against her regarding handling of flat fees the allegations against Placide should be dismissed.

Dated this 2<sup>nd</sup> Day of August, 2017.

/s/

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Kurt M. Bulmer, WSBA # 5559  
Attorney for Carllene M. Placide

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